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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

ALI MIRZAI et al., Plaintiffs, Cross-defendants and Respondents, v. JOSEPH MATOSSIAN, Defendant, Cross-complainant and Appellant.	A100600 (Alameda County Super. Ct. No. 801060-5)

Introduction

Defendant Joseph Matossian, a commercial landlord, appeals from a judgment in favor of his former tenants, plaintiffs Ali Mirzai and Hassan Afare, following a jury trial in the Alameda County Superior Court. Plaintiffs were awarded compensatory damages of $150,000 and punitive damages of $100,000 upon findings of breach of contract, breach of the covenant of quiet enjoyment, breach of the covenant of good faith and fair dealing, constructive eviction, trespass, and fraud (including intentional concealment of a material fact and intentional misrepresentation). The jury also found in favor of defendant on his cross-complaint for breach of contract, but awarded zero damages.

Defendant contends the damages awards were contrary to law and are unsupported by substantial evidence. He further contends various "procedural irregularities" require reversal of the judgment.

In a motion filed separately, but considered together with this appeal, plaintiffs seek sanctions for the filing of a frivolous appeal.

We shall affirm the judgment and deny the request for sanctions.

Statement of the Case

Plaintiffs filed their initial complaint in July 1998. They filed the second amended complaint, upon which the case was tried, on May 15, 2000.[1] Defendant answered and filed a cross-complaint alleging breach of contract on July 24, 2000. Plaintiffs' case went to trial on causes of action for breach of the covenant of quiet enjoyment, breach of contract, constructive eviction, breach of the covenant of good faith and fair dealing, trespass, fraud and fraudulent concealment. The Honorable Horace Wheatley presided at the jury trial. Trial began on June 15, 2001, and on July 27, 2001, the jury returned special verdicts in plaintiffs' favor on the complaint and awarded compensatory damages in a lump sum of $150,000. They also found that defendant "acted with malice or oppression toward plaintiffs." On defendant's cross-complaint for breach of contract, the jury found that plaintiffs had breached the lease agreement and that defendant had sustained damages as a result. However, it awarded "$0" damages for the breach. Following a bifurcated hearing on punitive damages, the jury assessed punitive damages against defendant in the sum of $100,000.

During the reading of the special verdicts, jurors advised the court that an error had been made on the written special verdict form for Special Verdict 3. The jury, having found that defendant failed to perform his obligations under the lease (Special Verdict 2), was then asked, "If the answer to question 2 above is 'yes,' was such failure excused?" The written special verdict said "yes." The court announced the answer was "no," and upon polling, the jurors confirmed that they had found the defendant's breach was not excused. The error in the written form of question number 3 remained uncorrected at the time the verdict was filed.

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[1] In between these complaints, plaintiffs filed a supplemental complaint on February 28, 2000, and a first amended complaint on April 3, 2000.

On September 28, 2001, defendant moved for a new trial or for judgment notwithstanding the verdict. The motions were denied by operation of law when the court failed to rule on them within 60 days of the date they were filed. Nevertheless, on January 23, 2002, the court issued a statement of decision purporting to deny defendant's motion for judgment notwithstanding the verdict and to grant defendant's new trial motion unless a proposed remittitur reducing the amount awarded to plaintiffs and agreeing to waive any claim for damages on the cross-complaint was accepted by *defendant*.[2] The statement of decision relied upon the court's mistaken belief that the jury had found defendant's breach of contract was excused.[3] Defendant purported to agree to the reduction of the verdict against him and to waive any claim for damages on the cross-complaint. On February 1, 2002, plaintiffs moved to vacate the statement of decision as void, to correct the clerical error on which it was based, and to enter judgment in accordance with the jury's special verdicts. It does not appear on this record that the trial court ruled upon plaintiffs' motion to correct the clerical error.

Plaintiffs sought a peremptory writ on the grounds the order granting the new trial was void. We granted their petition and issued a peremptory writ of mandate commanding the superior court to vacate its order granting a new trial on the ground that

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[2] Under Code of Civil Procedure section 662.5, subdivision (b), only plaintiffs could consent to a reduction of damages awarded to them.

[3] In the statement of decision, the court reasoned that the evidence was insufficient to support the breach of contract verdict "since the jury determined that defendant's performance under the contract was excused." The court also reasoned that the causes of action for breach of the covenants of quiet enjoyment and good faith and fair dealing and for trespass were not supported by substantial evidence as these were premised on the contract and undermined by the finding that performance was excused. The court concluded that the award of zero damages on the cross-complaint was inconsistent with the finding of breach and damages. However, the court concluded the evidence was sufficient to support the jury's determination that defendant interfered with plaintiffs' use and enjoyment of the premises, that defendant concealed or suppressed a material fact that defendant was under a duty to disclose to plaintiffs, and that plaintiffs sustained compensatory damages as a result and that the findings regarding the fraud causes of action sufficed to support the punitive damages award.

"the trial court no longer had jurisdiction to issue an order for new trial when it purported to do so and the order is, therefore, void." (*Mirzai v. Superior Court* (May 28, 2002, A098267) [nonpub. opn.], typed opn., p. 4.)

Thereafter, plaintiffs successfully challenged Judge Wheatley pursuant to Code of Civil Procedure section 170.6, and the case was assigned to the Honorable Robert B. Freedman for further proceedings.

Plaintiffs renewed their motion to enter judgment according to the jury's verdict. After hearing, Judge Freedman ruled that the jury had found defendant's breach of contract was not excused. He therefore ordered entry of judgment nunc pro tunc "in accordance with the special verdicts as evidenced by the certified transcript of the proceedings." On August 14, 2002, judgment on the jury verdict was entered accordingly. Defendant filed a timely notice of appeal from the judgment. On November 26, 2003, plaintiffs filed a motion seeking sanctions against defendant for asserted violations of the California Rules of Court regarding appellate briefing and for the filing of a frivolous appeal. We ordered the sanctions motion to be decided with the merits of the appeal.

Statement of Facts[4]

In 1993, defendant owned commercial property on Solano Avenue in Berkeley. He had leased the premises located at 1887B Solano Avenue to the Changs, who operated a restaurant at that location. In October 1993, plaintiffs purchased the restaurant business from the Changs for $60,000, executed a new lease with defendant, and changed the name of the restaurant to Alietto's.

Unknown to plaintiffs at the time they purchased the restaurant, the premises were subject to a use permit restriction that the doors and windows at the rear of the premises be "sealed off to prevent entry into the rear yard and to prevent light and noise from

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4 We set forth the facts in the light most favorable to plaintiffs as the prevailing parties on the complaint. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2003) ¶ 8:74, pp. 8-31 to 8-32 (hereafter Eisenberg); *Kotler v. Alma Lodge* (1998) 63 Cal.App.4th 1381, 1383, fn. 1.)

being detrimental to the nearby residential uses . . . ." The City of Berkeley (City) had so ordered in 1982, after complaints from Leonard Schwartzburd, defendant's rear neighbor, about emission of odors, light and noise from the restaurant. Defendant and his previous tenants had ignored the order and there was no compliance with it over the next 14 years. Defendant did not inform plaintiffs of its existence. The City regarded defendant, as the property owner, as the person responsible for compliance with the sealing order. Transfers of the use permit from tenant to tenant were "just sort of record keeping." Plaintiffs were unaware of the restriction and believed the use permit was the same thing as the business license. Nevertheless, on September 22, 1993, before the close of escrow, plaintiffs signed a separate agreement with Schwartzburd to keep the doors and windows shut during business hours. However, plaintiffs continued to open the doors and windows when needed. They had no problems with Dr. Schwartzburd, who would come to eat at the restaurant, until defendant began his construction activities at the end of 1995.

At the time of plaintiffs' purchase, the premises were also subject to a seismic retrofitting ordinance imposed by the City, which required the defendant to perform seismic retrofitting work on the premises by 1998. Defendant had promised the Changs that he would not begin the seismic work until the end of their lease term in 1995. The Chang lease contained a statement that the retrofitting work would take approximately 60 days. Plaintiffs wanted defendant to begin the seismic work at the beginning of their tenancy in 1993. Defendant therefore promised in the new lease to begin the work "as soon as plans, permits etc. are secured," rather than wait until 1995. (Lease, ¶ 6.) Defendant also promised in the lease that the "work will be done at utmost efficiency to minimize the financial burdens on Lessor and Lessees." (Lease, ¶ 7.) Together, paragraphs 6 and 7 of the lease provided in their entirety:

"6. The [C]ity of Berkeley has designated the building at 1887 Solano Ave. as an unreinforced masonry (URM) buildin[g], and as such has determined that the said structure needs to be reinforced and retrofitted for earthquake safety. The Lessor hereby, announces his obligation and intention to the Lessees to comply with the City of Berkeley

regarding the reinforcement and retrofitting of the building at 1887 Solano Ave. as soon as plans, permits etc. are secured.

"7. Obviously there will be discontinuation of 'business as usual' even though the work will be done at utmost efficiency to minimize the financial burdens on Lessor an[d] Lessees. During the period of work on the building Lessees shall not be liable for any rent until such time as Lessor can deliver possession."

During a 20-minute meeting with plaintiffs before their execution of the lease, defendant explained the terms to plaintiffs, telling them his engineer was already working on the plans and permits and that the work would begin "very soon." He also told them the retrofitting would include remodeling and improving the building, at a cost to defendant of $200,000, to be completed within the initial term of their tenancy, that is, before April 1995. He also told them the work would take six to eight weeks, during which time the restaurant would be closed and they would not be liable for any rent. All experts agreed that the retrofitting was a six-to-nine-week job. Plaintiffs regarded the $6,000-per-month rent specified in the lease as too high. However, they accepted the rent based upon defendant's representations that he would remodel the premises in the course of retrofitting, so that plaintiffs would have a "first-class" restaurant. Based upon these promises and representations, plaintiffs purchased the restaurant from the Changs and entered into the lease with defendant.

Defendant had hired an engineering firm, BMP, to prepare plans and obtain permits for the retrofitting. Contrary to his representation to plaintiffs that the work would begin "very soon," he told BMP that "[t]here was no rush on the project." BMP partner Simon Akhavan testified, "I was specifically told that we can take our time." (The BMP plans were submitted to the City nearly two years later.) The BMP retrofitting plans were approved by the City and the permit was pulled on September 26, 1995. At some point, defendant told Akhavan that he was thinking about building an addition onto the premises. Akhavan told him that demolition of the rear wall and construction of an addition would need to be engineered. Defendant did not hire BMP or any other engineer or any other construction professional to do this modification.

No construction work was undertaken during the initial term of plaintiffs' tenancy, which ended in April 1995. (Lease, ¶ 1.)

Several months before the April 30, 1995 expiration of the initial term of plaintiffs' lease, defendant approached plaintiffs with a two-page Addendum to the lease (exhibits Nos. I-1 and I-2) providing for a five-year renewal of the lease and asked them if they wanted to exercise their option to extend the lease. Plaintiffs said that they did. Defendant told plaintiffs that the five years of rental rates shown on the first page of the Addendum were higher than the rents they would actually pay, which were accurately stated on the second page. He said he would present the page showing higher rents to the bank to obtain a larger retrofitting construction loan. Plaintiffs refused to sign page one of the Addendum; they signed only page two showing the actual rents. Defendant signed both pages of the Addendum and attached the Addendum to the existing lease. The purported signatures of plaintiffs on page one of the Addendum were forged. The parties thereafter treated the lease as extended for an additional five-year term, to April 2000. The lease had originally contained a three-year option period. Plaintiffs understood the additional two years of the option period, and the difference in rent structure for that period from that specified in the initial lease, were defendant's implied compensation to them for his failure to commence or complete the retrofitting work within the first six months of their tenancy as promised.

The approved retrofitting plans and permit called for filling the hollow bricks in the unreinforced masonry walls at the rear of the building with concrete to strengthen it, not to demolish the rear wall and build a new one. In late November or early December 1995, armed with the seismic permit obtained by BMP, defendant personally entered the restaurant during plaintiffs' lunch service without notice to plaintiffs and without closing the restaurant. The restaurant served customers lunch from 11:30 a.m. until 2:00 p.m. and dinner from 5:00 p.m. to approximately 9:00 p.m. During the next six months, working during plaintiffs' prime business hours, defendant demolished the concrete pad and apron at the rear of the building and, for about one month from January to February 1996, defendant built a floor-to-ceiling plywood wall extending several feet into the

restaurant preparation room. This wall as constructed violated defendant's existing permit. While building the plywood wall, defendant knocked down a space above the existing door where plaintiffs had stored cans of tomatoes and made a hole into the ceiling. He then demolished the rear masonry wall. He used a jackhammer for the demolition work. He also excavated a long trench in the rear yard of about 15 feet by 7 feet to a depth of several feet, telling plaintiffs and their employees he was building a "garden." In the excavated hole, defendant built a foundation for an addition to the rear of the building. During a six-month period, defendant brought bags of concrete, steel rebar and cement cinder blocks through the restaurant during midday hours when customers were being served. He would often begin working at 10:30 or 11:00 a.m. and continue until 4:00 p.m. He or his brother would carry plywood and other materials, including tools, wheelbarrows, bags of cement, rebar, and lumber and would haul trash out through the dining room while plaintiffs were trying to serve customers.

In April 1996, after building the plywood wall at the rear of the restaurant, defendant began taking down the rear wall without first installing a shoring system to provide lateral support for the remaining walls and roof, endangering plaintiffs, restaurant employees and customers. It took defendant approximately two months to tear down the rear wall. He then framed a new, wooden rear wall to which the addition would be joined. All of this work was done while plaintiffs, their employees, and customers were present. The plywood wall stayed up until October 1996, when the new outside wall was built. Only once in the entire 30 months of construction, did defendant seek permission to enter from plaintiffs. From December 1995 to August 1997, defendant regularly came onto the premises in connection with the construction work. He never notified plaintiffs in advance. He never told them he was going to demolish the rear wall before doing so. He never told them their safety was endangered. On March 10, 1996, plaintiffs, aided by an employee, complained in writing to defendant about the destructive effects of defendant's activities on their business. The excavation and jackhammering created dust and noise inside the restaurant; the building of the plywood wall inside the restaurant before demolition of the rear wall reduced the size of the preparation room, and cut off

ventilation from the rear so that the restaurant became very hot. Plaintiffs and their employees were excluded from the backyard, which they had always used to take breaks.

Defendant did not reply to plaintiffs' letter. However, about one week later, as plaintiff Afare was mopping up construction debris from the floor in preparation for the dinner service, defendant told Afare that it would take two or three weeks to finish the job and that Afare could close for that time, if he wished. Afare explained to defendant that they could not simply close the business without notice to their employees and customers and that they had perishable food in the refrigerator. "I can't just say close it and go." Since defendant had told them it would take two or three weeks more to finish, in these circumstances, they remained open. Defendant did not finish within a few weeks. He was not finished until more than two years later.

In March 1996, plaintiff Afare again asked defendant what he was building around the hole in the back yard. Defendant now told Afare he was going to move the restaurant's walk-in cooler to an addition in the back and make the dining room larger. Plaintiffs never authorized or consented to defendant doing anything other than what they believed was retrofitting; however, they did not object to his building a new walk-in cooler and making the dining room larger. The existing walk-in cooler was never moved and no new walk-in cooler was built.

Dr. Schwartzburd renewed his complaints with the City in the spring and summer of 1996, as defendant was building the addition. Schwartzburd believed defendant was building the new rear wall, with framing for new doors and windows to be installed at the rear of the premises, in violation of the 1982 sealing order. Schwartzburd complained to defendant and, when defendant ignored the complaints, he complained to the City. The City ordered defendant to submit revised plans showing no door and windows on the new rear wall. Defendant submitted revised plans, but refused to seal the door while he applied to rescind the sealing order.

Sometime before July 1996, defendant began the seismic work authorized under the permit by replacing the roof on the main structure. Defendant named himself as the general contractor for the seismic work. Like the work on the rear addition, with which it

overlapped in time, defendant conducted the retrofitting work during normal business hours, without notice and without closing the restaurant. It was noisy work. A debris chute was used to take the old roofing materials to the street level, where, on or about July 31, 1996, a dumpster was placed in front of the entrance. During this time defendant and his crew continued to cart out the demolition debris from the rear wall and the roof thorough the restaurant dining room during normal business hours. Roof work continued until October 1996.

Sometime around July 28, 1996, plaintiffs were forced to close the lunch business, which had been killed by the combination of the noise, heat, dust, debris and disruption caused by defendant's construction activities. They never reopened for lunch because of the ongoing construction. They remained open for dinner.

In July 1996, defendant asked plaintiffs to sign a paper agreeing to his construction of the addition, which plaintiffs believed was for the walk-in cooler. They did so. They did not know that construction of the addition was a project separate from and unnecessary to the City mandated retrofit.

Around August 5, 1996, defendant installed a screen door/security gate in the back of the restaurant. The screen was not covered. Consequently, lots of dust, construction debris and water came through the door into the restaurant. When it rained, water came into the restaurant under the door as well.

Beginning on August 6, 1996, the City issued a series of stop work notices on the seismic work and the storage addition. The seismic work plan was approved by the City on August 19, 1996. The storage addition was finally approved in October 1996. In September 1996, defendant rerouted the gas line through the attic.

The new rear wall was finished in October 1996, as was the roof. Before that work was finished, defendant made additional holes in the ceiling on top of the ice machine.

Following the replacement of the roof between June and October 1996, defendant completed the new rear wall and dealt with the City regarding the disallowed door in it.

The second phase of the retrofitting began around November 1996, when defendant opened up the ceiling in the front of the restaurant. He covered the holes with two or three pieces of canvass and the ceiling remained that way for eight or nine months, until August 1997. The canvass tarp above the dining room covering the holes in the ceiling would often fall down, dumping debris onto the tables below.

Defendant also made two big holes in the dining room floor under the prime window tables to prepare for the installation of steel beams at the front of the building. The holes were covered with plywood and plaintiffs complained to defendant about a smell coming from the holes. Two or three days later, defendant filled the holes with concrete. However, he left a board or bar sticking out from the floor, where the window table customers were to sit. Moreover, when the plywood was eventually removed, the floor was not level and a chair set on the floor would shake. Eventually defendant retiled the floor where the holes had been, but did not retile the surrounding floor so that the new tile did not match the old tile.

In November 1996, following this phase of the retrofitting, defendant ceased the seismic work altogether for nine months to focus on his bureaucratic problems with the City and Dr. Schwartzburd regarding the rear wall and addition he had begun over a year earlier. He left the interior of the restaurant unsightly, with an uneven floor at the front of the restaurant and an unstable canvass tarp hanging from the ceiling.

On April 8, 1997, about a year after beginning the seismic work and 18 months after he had begun the addition, plaintiffs again complained about the time it was taking defendant to complete the work. They asked for a new five-year lease with a rent abatement and an option to renew for an additional five-year term. Defendant told them he preferred to keep the existing five-year lease.

Shortly thereafter, defendant began discussions with UltraLucca, a corporate delicatessen doing business as AG Ferrari Foods, to replace plaintiffs as his tenants. Matthew Holmes, a realtor representing UltraLucca, testified that a use permit for a restaurant on Solano Avenue was a "hot ticket," because only a limited number of permits for food-related establishments were allowed by the City on the busy street. In

July 1997, defendant notified plaintiffs that he would close the restaurant to do retrofitting in August. At that time, defendant for the first time told plaintiffs that he was refusing to do the remodeling of the premises he had promised. He also told plaintiff Mirzai that he was would not stand in plaintiffs' way and that " '[y]ou can walk away right now.' "

In March and again in July 1997, under the threat of revocation of the use permit, defendant agreed to City's demand that he seal off the rear door, but he did not actually do so until March 1998.

In early August 1997, upon notice, defendant shut the restaurant down to complete the seismic work.

During the period of closure for retrofitting in August 1997, defendant damaged the interior and the exterior and changed the exterior of the premises in violation of the building permits he had obtained. As a result, the restaurant was more unsightly and in worse condition when he "completed" the retrofitting than before he evacuated plaintiffs for the work. Among other things, he downgraded the interior of the restaurant, replacing marble window sills with bare sheetrock; he broke several light fixtures, including ceiling fans and an antique chandelier plaintiffs had purchased from the Changs; he cracked the front plate glass window; he removed molding without replacing it; and he left the interior of the premises unpainted. He replaced colorful tiles on the front of the restaurant and the tile entryway with bare stucco. He disconnected the electricity to the front exterior of the building. Defendant also attempted to complete the storage addition during the August 1997 closure of the restaurant, but failed to do so. Meanwhile, he was negotiating with UltraLucca to replace plaintiffs as his tenants in 1998, before plaintiffs' lease expired in 2000. On August 25, 1997, defendant announced that he had completed the seismic work on the premises and returned the key to plaintiff Mirzai. Defendant admitted the premises were not in "usable condition" at the time he returned the keys to plaintiffs, but argued he had left it in "rough" condition because plaintiffs were going to do remodeling.

Defendant continued to work on stuccoing the addition after August 1997, because that project was not completed when he announced he was finished with the retrofitting work.

The walls of the addition constructed by defendant were not properly sealed. When it rained, water came in under the walls and the door through the storage addition and into the preparation room of the restaurant, flooding it. Moreover, the addition was not properly hardwired or fireproofed.

Although defendant had announced the retrofitting was completed, the City's health department forbade the reopening of plaintiffs' restaurant because defendant's construction had left the building, including the addition, out of compliance with health codes. Plaintiffs withheld rent for September and October 1997, while requesting that defendant complete the repairs and work necessary to gain the City's approval to reopen. Defendant made a few attempts to make some of the repairs the City required, but these efforts were not adequate and the City continued to refuse permission to reopen the restaurant.

UltraLucca offered defendant a lease in which they would be paying $200 more a month than plaintiffs were paying at the time. Defendant advised UltraLucca that plaintiffs' lease would not expire until April 2000, whereupon UltraLucca approached plaintiffs with an offer to buy out the two and one-half years remaining on their lease for $35,000. Having invested more than $60,000 in the business purchase and four years of their lives in the restaurant, plaintiffs refused UltraLucca's offer. Defendant immediately served plaintiffs with a 3-Day Notice to Pay Rent or Quit. Under protest, plaintiffs paid the withheld rent. To get the restaurant operating again, plaintiffs spent $13,737 to make the repairs necessary to satisfy the City health department and to finish the remodeling of the interior that defendant had promised to do as part of the retrofitting work. Plaintiffs performed much of the labor themselves, working full time at the task. On November 19, 1997, the City gave plaintiffs permission to reopen after they had been shut down for more than three months.

Meanwhile, the City ordered defendant to repair certain construction defects that he had created in the course of retrofitting, including damage to the storefront, changing the clerestory windows, the tile, the wainscoting on the front of the building and the tile entryway. In March 1998, defendant finally hired licensed contractor Tim Corbett to repair defendant's construction blunders. Corbett made sure his workers were out of the restaurant by 2:00 p.m. every day so that plaintiffs could prepare for their dinner business. Corbett worked with defendant and with the City design review board to remedy permit violations and unauthorized modifications to the building. From March through May 1998, Corbett repaired all the damage that defendant's construction and retrofitting had caused to the building: he waterproofed and fireproofed the addition; he repaired the drainage system that defendant had installed, modifying and continuing the French drain; he reinstalled sheetrock on the rear addition; he worked with the design review board to fix the front of the building, including tile work on the front and on the floor at the entry; he restored the wooden clerestory windows above the plate glass windows; he patched holes and sheetrock; he ran a telephone line; he repaired a light fixture in front of the restaurant; and he textured and painted. Corbett also closed up the rear entry and sealed the doors as required by the 1982 sealing order and had a ventilation system installed on the roof to improve air circulation thereafter. Defendant paid Corbett approximately $79,000 to correct and complete the unfinished or improperly done construction.

In May 1998, a gas leak occurred at the location where defendant had himself extended the gas line in order to move the water heater to the rear of the building. The gas leak forced the restaurant to be closed for one week. Plaintiff Afare testified that defendant "forgave" $960, the amount plaintiffs' owed for the garbage for the one week closure, but then charged plaintiffs $2,200 for repair of the gas leak.

Defendant had told the realtor representing UltraLucca that plaintiffs' lease would not expire until April 2000. UltraLucca, which remained interested in taking over the premises as late as February 1998, advised defendant to inform plaintiffs that their lease would not be renewed upon its expiration in April 2000. Around May 1998, UltraLucca

proposed a long-term lease in the amount of $7,100—a significantly higher amount than plaintiffs were paying. In April 2000, plaintiffs' lease expired. It was not renewed, and they vacated the premises.

The construction, including the addition, the retrofitting, and the corrective work took approximately 30 months—from late November or early December 1995 (when defendant first entered without notice to demolish the concrete pad and begin the foundation for the unauthorized addition) through May 1998 (when Corbett completed his work). Plaintiffs paid a total of $172,000 in rent during this period, including about $18,000 for the months of September through November 1997, when they were closed down by the City following defendant's construction in August. They paid $13,737 out of pocket to repair the premises in order to reopen for business. They also invested their own labor in making these repairs, and testified it cost them $24,000 to $25,000 to reopen the restaurant.

Plaintiffs paid rent of $6,100 per month until 1996. In 1996, they were supposed to pay $6,250 per month under the Addendum to the lease. Defendant said to continue making monthly payments of $6,100 as before. One year later, in 1997, defendants paid $6,400 per month per the Addendum, but actually paid $18,000 for the months of October, November and December. Defendant did not tell them why he asked for less than the full amount of rent and they did not ask.

After 1998 and the end of construction, business got better. The restaurant saw a 40 percent increase in 1998, which plaintiffs attributed to not having the construction going on. Plaintiffs did not reopen their lunch business in 1998, believing it was going to take time to build it up again and the lease would expire in April 2000. Plaintiffs introduced evidence of their business losses during their tenancy attributable to defendant's construction activities. Monochair Fooni, the bookkeeper for the business, testified based upon financial statements for the business from 1993 through January 2000. He stated that the new business had a net loss in 1993 of $20,715.58, and in 1994, of $29,345.11. He testified that the business had a net profit of $15,876.91 in 1995, of which $5,374.32 was attributable to operating income and the balance to "interest."

From January to March of 1996, net profit was $3,726.24. From March to June 1996, the business showed a net loss of $603. From July through December 31, 1996, the business showed a net loss of $4,400 for a total net loss in 1996 of $1,287.47. In 1997, the business showed a net loss of $44,628.21. From January through June 1998, the business showed a net profit of $15,932.04. For the full year of 1998, the business showed a net profit of $7,033.07. If legal fees were listed separately, the business would have shown a profit of approximately $16,000 in 1998 (legal fees in 1998 were $9,100), and a net profit in 1999 of $49,000 (legal fees in 1999 were $38,821.20). For the month of January 2000, net profits were $9,460.20.

Plaintiffs produced evidence that from about March 1996, through the completion of the addition, plaintiff Afare suffered constant emotional distress. Specifically, Afare testified that starting in March 1996, he felt angry and upset because the construction had already extended beyond the two months he understood it would take. They were losing business due to the construction, despite working hard. He remained angry and upset for the two and one-half years the construction continued. He had trouble sleeping and when he slept, he had bad dreams. He would waken in the night, talking. This had a harmful effect on his marriage. His wife of 18 years left him to sleep elsewhere during the construction. He testified, "I was talking all the time about the construction to everybody, what happening. What's going on. And my wife said, 'You always talking about the construction.' I was upset. [¶] We decided before we get divorce, we didn't want to get divorce, we decided she goes to my sister's house in San Jose, and I stay here. And when everything is cool down, we go back together." Afare and his wife lived apart for about one year, beginning in the middle of 1997. When the construction ended, they resumed living together. Afare also suffered physical symptoms. His hand and his side were hurting him and he began crying frequently. His appetite diminished and his smoking increased. He did not seek treatment, because he did not have the money.

Lawrence Kessler, a health inspector for the City from 1996 through 1998, confirmed Afare's distress during March through August 1996. Afare was very upset and agitated during the entire period. He was venting and would stop Kessler on his rounds

and talk unofficially about the problems with the building and the owner. Sharon Buckner, employed by the City as a building inspector since 1996, testified that before May 1998, the tenant in Alietto's restaurant had "repeatedly" made comments to her about being unhappy with the construction going on in the business. He appeared agitated or irritated when he talked to her about the problems. Brion Alaric, a waiter at Alietto's, testified that Afare complained to him every single day about how the construction activities were affecting him. He complained that he was having trouble sleeping at night and was developing pains in his shoulders, that the construction was causing problems with his marriage because he was so stressed out. Afare was usually a "really easy going guy most of the time; always in a good mood, and it just really affected his nature. He just became really . . . nervous and stressed out about the business." Alaric heard Afare complain to others as well. His complaints lasted until the restaurant closed. Pasquale Littlejohn, also a former waiter at Alietto's, testified that Afare complained very frequently for a time about the construction. "He was very frustrated. At times, very angry. And also at times, very depressed; tired. He had acquired some kind of a shoulder problem. Um, just consumed." Afare needed help lifting objects during this period.

I. Breach of Contract

Defendant contends that there was no breach of express terms of the lease agreement because the language relating to retrofitting was a "notice and a warning" and not a "construction contract," and that admission of evidence regarding the promise to remodel directly contradicted paragraph 5 of the lease, in violation of the parol evidence rule. Defendant also contends that there could be no breach of implied covenants because such implied covenants were contrary to express terms of the lease. In his reply brief, defendant for the first time argues that the breach of contract verdict is unsupported by substantial evidence.

A.

1. Defendant's argument is premised upon his interpretation of the lease provisions relating to the retrofitting as a "notice and a warning" rather than a promise to

perform the work "as soon as plans, permits etc. are secured," and that "the work will be done at utmost efficiency to minimize the financial burdens on Lessor an[d] Lessees." (Lease, ¶¶ 6, 7.)

Plaintiffs testified that when they entered into the lease, they understood the retrofit would include not only the seismic safety work, but also extensive remodeling to be undertaken by defendant and that the work would start "very soon," within six months, as an engineer was already working on the plans, and that the work would take six to eight weeks to complete. They understood this because the defendant told them so before they executed the lease. They also testified that they would not have entered the lease had they known the work would take far longer than six to eight weeks, that defendant was going to build an addition, or that he was going to try to do the work himself rather than hiring professionals.

The lease is an integrated document. (Lease, ¶ 21.) Defendant argues that the evidence of defendant's promises regarding the time frame within which the work would be started and completed was inadmissible as contrary to the express terms of the lease. We disagree. The lease contained a promise to conduct the work with "utmost efficiency." Although one could read paragraphs 6 and 7 as a "notice and a warning," as defendant asserts, it need not be so read. The evidence introduced by plaintiffs regarding the promises to begin work within the first six months of the lease, and to complete work in six to eight weeks from initiating it, were admissible under the parol evidence rule.

"The parol evidence rule 'generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument' [citation] ' "because [such evidence] cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." [Citation.] [Fn. omitted.]' [Citation.]" (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 378-379.)

"We begin by noting the oft-stated rule that parol evidence is properly admitted to construe a written instrument when its language is ambiguous. The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to

the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is 'reasonably susceptible.' (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.)

"The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. (*Blumenfeld v. R. H. Macy & Co*. (1979) 92 Cal.App.3d 38, 45.)" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165; accord, *Pacific State Bank v. Greene, supra,* 110 Cal.App.4th at p. 385.) We "independently construe the writing to determine whether the release encompasses the present claim." (*Winet* v. *Price,* at p. 1166.) We look at the agreement as a whole to determine whether it is reasonably susceptible to the interpretation urged by plaintiff. (See *Bodle* v. *Bodle* (1978) 76 Cal.App.3d 758, 764.)

In the context of the entire agreement, the language of paragraphs 6 and 7 at issue here is " 'reasonably susceptible' to the interpretation urged" by plaintiffs. (*Winet v. Price, supra,* 4 Cal.App.4th at p. 1165.) Indeed, the phrasing of the lease provision that the work would begin "as soon as plans, permits etc. are secured" and that such work would be done "at utmost efficiency to minimize the financial burdens" is more reasonably susceptible to the interpretation given by plaintiffs—that work was to begin within six months and would be done in six to eight weeks—than to the interpretation given by defendant—that he could begin any time, could continue the work for whatever period he wished, and that he had until 1998 to complete the seismic work. That the lease also acknowledged that the seismic retrofitting work would involve "discontinuation of 'business as usual' " during the retrofitting, does not contradict the conjoined promise that such work would be done with "utmost efficiency to minimize the financial burdens on Lessor an[d] Lessees." (*Lease,* ¶ 7.) If anything, the provision emphasizes the point that the work would be done as quickly and efficiently as possible.

Aided by this extrinsic evidence and assuming, as we must, that the jury found plaintiffs' testimony in this regard credible and defendant's testimony not credible, the second step of interpreting the contract in accordance with that parol evidence is an easy task. (*Winet v. Price, supra,* 4 Cal.App.4th at p. 1165; accord, *Pacific State Bank v. Greene, supra,* 110 Cal.App.4th at p. 385.)

Moreover, "at least since the parol evidence rule's codification in this state in 1872, the rule has specified statutory exceptions for mistake, illegality or fraud. (Code Civ. Proc., § 1856, subds. (e), (f), (g).)" (*Pacific State Bank v. Greene, supra,* 110 Cal.App.4th at p. 379.) In *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, the California Supreme Court narrowed the fraud exception so as to exclude "a promise directly at variance with the promise of the writing." (*Id.* at p. 263.) Substantial evidence supports the jury's finding of fraud in connection with the promises made by defendant as to the meaning of the terms in the contract and as to his intention to conduct the retrofitting work promptly and with "utmost efficiency." Neither promise is "directly at variance with the promise of the writing." (*Id.* at p. 263.) Indeed, they are consistent with the terms of the lease agreement and were properly admitted into evidence.

Consequently, we reject defendant's contention that the breach of contract verdict was erroneous. In failing to conduct the work with "utmost efficiency," defendant breached both an express term and an implied term of the contract.[5] Further, his failure to begin the retrofitting work within the six months time frame (or at any rate within a

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[5] Defendant's citation of *North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764 is perplexing. He quotes from the case as follows: "No party contracting for the services of another need negotiate with the other regarding the latter's burden to perform the contract reasonably and competently. Absent an express contractual provision to the contrary, such burden is already imposed by law upon the performing party and, as we have shown, enforced in tort with a more expansive measure of damages." (*Id.* at p. 784.) That such a term is *implied* in a contract and may be enforced in tort does not prevent the term from being made an *express* term of the contract, as was done here by promising the work would be done with "utmost efficiency."

reasonable time), and to perform the retrofitting work in a timely manner, each constitute a breach of the lease terms, whether express or implied.

2. The promise to extensively "remodel" the premises stands on a different footing with respect to the lease as a whole. Although not inconsistent with paragraphs 6 and 7 regarding defendant's retrofitting obligation, as discussed above, the promise to remodel is directly at variance with the provision of paragraph 5 of the lease: "Unless otherwise provided by written agreement, all alterations, *improvements* and changes that may be required shall be done by or under the direction of Lessor *but at the cost of Lessee.*" (Lease, ¶ 5, italics added.)[6]

However, it is doubtful that defendant has properly preserved this claim. In the section of his opening brief discussing the alleged violation of the parol evidence rule, he limits his claim that the remodeling promise "directly contradicted the lease in which defendant merely announced his obligation to the [C]ity to perform seismic retrofitting work." Hence, he contends the provision conflicts with paragraphs 6 and 7 of the lease regarding retrofitting, which we have determined are not inconsistent with the remodel promise. He never mentions paragraph 5 in the parol evidence section of his opening brief. Rather, he waits until his reply brief to mention paragraph 5 in connection with his

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[6] The standard form paragraph of the lease relating to alterations and repairs states: "5. Lessee agrees that the leased premises are now in tenantable and good order and condition and that Lessee shall keep and maintain these premises in good and sanitary order and condition, and that no damages, alterations, or change whatever shall be made in or about the leased premises without the written consent of Lessor. *Unless otherwise provided by written agreement, all alterations, improvements and changes that may be required shall be done by or under the direction of Lessor but at the cost of Lessee*. All alterations, additions, and improvements made in and to the leased premises shall, unless otherwise provided by written agreement, be the property of Lessor and shall remain upon, and be surrendered with the leased premises. Lessee shall not mar or deface in any manner the walls, woodwork, or any other part of the leased premises. All damage or injury done to the premises or property of the Lessor by the Lessee, or by any person who may be in or upon the premises, with the consent of the Lessee, shall be paid for by the Lessee at the time the damage or injury is inflicted. Lessee shall, at the termination of the lease, surrender the leased premises to Lessor in as good order and condition as received, normal wear and tear excepted." (Lease, ¶ 5, italics added.)

parol evidence argument and then makes paragraph 5 the primary basis of an extended argument. Arguably, defendant has waived any argument on appeal that the remodel promise was inconsistent with paragraph 5 of the lease. (Eisenberg, *supra*, ¶¶ 9:78-9:78.3, pp. 923 to 9-24.)

Defendant does specifically quote this part of paragraph 5 in his opening brief in connection with his claim that it was plaintiffs' responsibility to satisfy the health department requirements for reopening the restaurant. He argues that the lease required plaintiffs to "maintain [the] premises in good and sanitary order and condition" and to pay the cost of "all alterations, improvements and changes that may be required." (Lease, ¶ 5.) (See pt. II.D., *post*.) Assuming, without deciding, that such reference is sufficient to avoid waiver of the parol evidence rule claim, we conclude that admission of references to defendant's promise to remodel the premises constitutes harmless error. (See *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 422-424.)

We cannot set aside a judgment or grant a new trial based on evidentiary error "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art VI, § 13; see Code Civ. Proc., § 475; Eisenberg, *supra*, ¶ 8:285 et seq., p. 8-132 et seq.) In *Continental Airlines, Inc. v. McDonnell Douglas Corp.*, *supra*, 216 Cal.App.3d 388, the appellate court held that the erroneous admission of parol evidence was harmless because the inadmissible evidence was not the only thing that the plaintiff emphasized in examining witnesses and in closing argument.

"Counsel did not unduly emphasize the single promissory representation from [defendant's] brochures which, as we discussed, was admitted in error. Further, that promise was less the subject of inquiry during [plaintiff's] examination of witnesses than were the other representations about the breakaway feature. [¶] Thus, we must conclude, after an examination of the entire record, that the challenged evidence of promissory fraud was merely *cumulative* of other properly admitted evidence on that subject; consequently, its admission was not prejudicial to [defendant's] cause. (Cal. Const.,

art. VI, § 13; *Kalfus v. Fraze* [*, supra,*] 136 Cal.App.2d [at p.] 423; 9 Witkin, Cal. Procedure [(3d ed. 1985)] Appeal, . . . at § 338, pp. 345-346.) There was here no miscarriage of justice. (*Ibid.*)" (*Continental Airlines, Inc. v. McDonnell Douglas Corp., supra,* 216 Cal.App.3d at pp. 423-424.)

Here, too, defendant has not shouldered his burden of affirmatively demonstrating prejudice. The burden is upon the appellant to show not only error, but that the error resulted in a "miscarriage of justice." (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; Eisenberg, *supra*, ¶¶ 8:285-8:292, pp. 8-132 to 8-134.) An error is prejudicial only when " ' "it is *reasonably probable* that a result *more favorable* to the appealing party would have been reached in the absence of the error." ' " (E.g., *Pool v. City of Oakland,* at p. 1069, italics added; Eisenberg, *supra*, ¶ 8:292, p. 8-134.)

Defendant argues for the first time in his reply brief that admission of the remodeling evidence "misled the jury" and that plaintiffs relied upon that evidence to characterize defendant as a "liar."[7] Again, even assuming that defendant has not waived his assertion of prejudice, his claim must fail. First, the asserted "remodel" promise was not the sole or even the principal basis for the claims of breach of contract, fraud or misrepresentation. Other promises, including the promise that the retrofitting work would take six to eight weeks to complete, were much more critical to these causes of action. Second, ample other evidence was presented regarding defendant's lack of veracity, including but not limited to his numerous misstatements and false statements during his trial testimony, and his use of the false Addendum to obtain his bank construction loan and inferences of his forging plaintiffs' signatures on that document.

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[7] Defendant's entire argument on the subject of prejudice is that "the remodeling evidence misled the jury. At trial, plaintiffs relied heavily on characterizing defendant as a liar but offered no proof of contract damages other than possibly $13,787 spent complying with the Health Department's requirements. The jury's $150,000 compensatory damages verdict coupled with $100,000 punitive damages appear to indicate that it believed defendant misrepresented that he would remodel the premises."

Third, contrary to defendant's unsupported assertion, the record does not indicate that any of the jury's damage award was based upon defendant's failure to remodel the premises, as promised. There were ample other bases for the award of both compensatory and punitive damages and defendant makes no attempt to show how the damages awarded flowed from this particular evidentiary error. In this instance, we can confidently conclude that introduction of evidence of defendant's promise to remodel the premises as part of the retrofit was harmless error. Absent such error, it is not reasonably probable that the jury would have returned a verdict more favorable to defendant. (*Pool v. City of Oakland, supra,* 42 Cal.3d at p. 1069.)

B. Defendant's claim that he "had limited and indirect control of the 'retrofitting and reinforcement,' and the pace of accomplishing it" is belied by the record. Substantial evidence supports the conclusion that defendant had ultimate control over the pace of construction, from his advising the engineer drawing the plans that there was "no rush," to his naming of himself as the person in whose name the retrofitting permit issued and performing much of the work himself or with relatives and friends until hiring Corbett to repair his mistakes and complete the job. Moreover, the jury could reasonably attribute to defendant delays occasioned by his failure to promptly comply with requirements imposed by the City, by his personally building the addition, and by his failure to competently perform work in the first instance.

C. Defendant argues that plaintiffs failed to prove a breach of the implied covenant of quiet enjoyment or that they were constructively evicted.

"[T]he covenant of quiet enjoyment . . . insulates the tenant against any act or omission on the part of the landlord, or anyone claiming under him, which interferes with a tenant's right to use and enjoy the premises for the purposes contemplated by the tenancy." (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846.) "An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired during the term of the hiring. . . ." (Civ. Code, § 1927.) Under this section, an implied covenant on the part of a landlord exists to provide the tenant with quiet enjoyment and possession of the premises during the continuation of the term.

(*McDowell v. Hyman* (1897) 117 Cal. 67, 70; see also *Petroleum Collections, Inc. v. Swords,* at p. 846; Friedman et al., Cal. Practice Guide: Landlord-Tenant (The Rutter Group 2003) ¶¶ 4:1, 4-8.0, pp. 4-1, 4-5 (hereafter Friedman).) Upon the landlord's breach, the tenant has a choice of remedies, including to continue under the lease and sue for damages. (*Guntert v. City of Stockton* (1976) 55 Cal.App.3d 131, 138; Friedman, *supra*, ¶¶4:21, 4:24, pp. 4-8, 4.81-4.82, and cases there cited.)

Defendant contends that plaintiffs waived the breach by signing the lease, which announced that the retrofitting would disrupt business as usual (Lease, ¶ 7) and which also authorized the landlord to enter the premises to make "necessary or agreed repairs" (Lease, ¶ 10(b)), and by failing to vacate the premises during construction. We disagree.

"[T]he covenant of quiet enjoyment can be *modified* or *waived* by an express provision in the lease" in the commercial property context. (Friedman, *supra,* ¶ 4:4,p. 4-2; see *Lee v. Placer Title Co.* (1994) 28 Cal.App.4th 503, 513; *Conterno v. Brown* (1968) 263 Cal.App.2d 135.) However, neither the provision of the lease recognizing that business would be disrupted during the retrofit nor that granting the landlord permission to enter to make repairs waived the covenant in this case. Rather, at most, those provisions modified the covenant to allow such disruption for a *reasonable* period of time to conduct the retrofit. "If the statutory procedures are followed, the landlord's entry does *not* breach the covenant of quiet enjoyment. Similarly, so long as the landlord acts reasonably in fulfilling the statutory duty to make repairs ([Civ. Code,] § 1941), interference with a tenant's use of the premises in order to make the repairs does not breach the covenant. [Citation.] [¶] On the other hand, a landlord who . . . performs repair work in an *unreasonable* manner, thus *unnecessarily* disturbing the tenant's beneficial use and enjoyment, may be liable for breaching the covenant. [Citations.]" (Friedman, *supra,* ¶ 4:20, pp. 4-7 to 4-8; see also Miller & Starr, California Real Estate (3d ed. 2004) § 19:154, pp. 488-489 (hereafter Miller & Starr).) "A reentry cannot be made for the purpose of making extensive alterations that would *unreasonably interfere* with the tenant's possession unless the right is expressly reserved in the lease." (Miller & Starr, § 9:154, p. 488, italics added, fn. omitted.)

Substantial evidence regarding the unreasonable manner of defendant's carrying out the construction of the addition to and retrofitting of the restaurant, and of the effect upon plaintiffs and their business, supports the jury's finding that defendant breached the implied covenant of quiet enjoyment.

Defendant also argues that the verdict for breach of the covenant of quiet enjoyment cannot be sustained because plaintiffs failed to show they were constructively evicted or that they vacated the premises as a result of defendant's actions. Again, we disagree. Authorities appear split on the question of whether an actionable breach of the covenant may be found where the tenant does not vacate the property in a reasonable time following the breach. (See Friedman, *supra,* ¶¶ 4:21, 4:24, pp. 4-8, 4-8.1 to 4-8.2.) Traditionally there could be no action for breach of the covenant of quiet enjoyment unless the tenant vacated the premises. (*Id.* at ¶ 4:21, p. 4-8.) "However, some cases have taken a more liberal approach, holding that a tenant *can* recover damages for a breach of the covenant although still in possession of the premises. These cases recognize that tenants may lose the benefits of their rental agreements by conduct amounting to something less than complete ouster—i.e., 'some act of molestation, affecting to . . . [tenant's] prejudice, the possession of the covenantee.' " (*Ibid.,* citing *Guntert v. City of Stockton, supra,* 55 Cal.App.3d at pp. 140-141; *Lee v. Placer Title Co., supra,* 28 Cal.App.4th at pp. 513-514; *Marchese v. Standard Realty & Develop Co.* (1977) 74 Cal.App.3d 142, 148; see also *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1152-1153 [distinguishing an action for covenant of quiet enjoyment from a constructive eviction claim in this regard].)

As the court recognized in *Guntert v. City of Stockton, supra,* 55 Cal.App.3d 131, "[a] number of decisions describe a rule declaring that a nonphysical interference with the tenant's enjoyment constitutes a constructive eviction; that the tenant may not recover for the eviction unless he first vacates the premises. [Citations.] Another version of the rule is that the covenant of quiet enjoyment is not breached until there has been an actual or constructive eviction. [Citations.] [¶] Stated in these flat terms, the rule would preclude a tenant from seeking damages for a breach of quiet enjoyment not amounting to

an eviction. Stated in these terms, the rule is incomplete, for it fails to recognize the tenant's choice of remedies for breach of the lease, namely, his option to stand upon the lease and sue for damages." (*Id*. at p. 140.)

We agree with *Guntert v. City of Stockton, supra,* 55 Cal.App.3d 131, and those authorities that differentiate between breach of the covenant of quiet enjoyment and constructive eviction, and conclude that breach of the covenant of quiet enjoyment does not require a complete ouster. (But see Miller & Starr, *supra*, § 19:159, pp. 502-506.)

Moreover, the evidence here was sufficient for the jury to find that plaintiffs *were* constructively evicted. The jury found plaintiffs were not "evicted from the premises." (Special Verdict 8.) However, they did find "plaintiffs were required by defendant to vacate the premises." (Special Verdict 9.) We believe this latter finding is sufficient to constitute a finding of constructive eviction. "To invoke a constructive eviction defense or remedy, the aggrieved tenants must *surrender or vacate* within a reasonable time after the landlord's material interference with the lease . . . ." (Friedman, *supra,* ¶ 7:298, p. 7-61.) The jury could well conclude on the evidence before it that plaintiffs suffered a partial constructive eviction when they were denied any access to the yard from December 1995 through October 1996, and permanently cut off after May 1998, due to defendant's actions. The temporary plywood wall built by defendant as part of his construction of the addition forced plaintiffs to vacate a portion of the restaurant's preparation room for about 10 months in 1996. "A tenant who is evicted from a *portion* of the premises may remain in possession of the remainder of the premises and recover damages for the wrongful eviction from the portion from which he or she was dispossessed." (Miller & Starr, *supra,* § 19:159, p. 505, fn. omitted, italics added.) Moreover, "[t]he tenant can enforce remedies for breach of the lease while remaining in possession if the landlord breaches some other covenant of the lease, such as an agreement not to lease adjacent space to a competitor. (*Ibid.,* fn. omitted.) It was for the jury to determine whether such denial substantially affected the plaintiffs' enjoyment of a material part of the premises. (Friedman, *supra,* ¶¶ 4.8, 4.27, pp. 4-5, 4-8.2.)

Furthermore, the jury could also determine that the ouster occasioned by the condition of the premises and the related refusal of the health department to allow plaintiffs to return following defendant's "completion" of the retrofitting in a manner that left it out of compliance with health codes was a constructive eviction. (See Friedman, *supra,* ¶¶ 7:288-7:298, pp. 7-59-7.61.) So too, plaintiffs' exclusion from the premises for a week due to the gas leak caused by defendant's moving the gas line could be viewed by the jury as constituting a constructive eviction by defendant.

D. Defendant argues that under the lease, maintenance and repair obligations, including the obligation to meet City health department requirements, were the obligation of plaintiffs and not defendant. (Lease, ¶ 5; see fn. 6, *ante*.) Therefore, defendant argues, plaintiffs could not recover any damages attributable to the health department's refusal to allow the restaurant to reopen following defendant's completion of the retrofitting.

"Leases frequently contain express covenants on the part of the tenant to repair and to surrender the premises in good condition. The extent of the tenant's duty in such event is determined by the scope of the covenant. The covenant is interpreted *reasonably* to avoid placing an unwarranted burden of improvement on the tenant." (Miller & Starr, *supra,* § 19:127, p. 387, italics added, fns. omitted.) "However, a broad general covenant to repair in a nonresidential lease has been held to require the tenant to repair damage caused by acts of God, the elements, or strangers." (*Id.*, § 19:127, p. 388, fn. omitted.) The covenant here is not so broad. Indeed, it specifically imposes the retrofitting obligation upon defendant. Moreover, the refusal of the health department to allow the restaurant to reopen was attributable in substantial measure to defects in defendant's retrofitting and his failure to complete the storage addition.

The evidence here was sufficient to allow the jury to determine that the actions of the landlord in conducting the retrofitting unreasonably, failing to properly construct and complete the storage addition, and causing the damage to the restaurant that led the City to refuse to allow it to operate went far beyond the normal and expected repair and maintenance obligations of the lease.

We have found no case in which such a provision was interpreted so broadly to require the tenant to repair damage attributable directly to the *landlord's* improper, illegal, and defective construction.

II. Tort Damages Award

A. Defendant contends that the jury awarded plaintiffs tort damages for breach of the implied covenant of good faith and fair dealing (a contract cause of action) and that such award was legally unavailable to plaintiffs. (*Fairchild v. Park* (2001) 90 Cal.App.4th 919, 927.) Defendant premises his argument upon the general damages award of $150,000 and the jury's special verdicts in favor of plaintiffs on the contract and various tort causes of action. However, he does not cite to the record in support of this contention. Nor could he. At no point do the special verdicts or the judgment allocate damages awarded to plaintiffs to any particular contract or tort cause of action or theory. Certainly, there is no indication that *any* of the damages awarded necessarily were for breach of the implied covenant. A fortiori there is no reason to assume that *tort damages* were erroneously recovered for breach of the implied covenant. Indeed, plaintiffs stipulated they were not seeking tort damages for breach of the implied covenant and the trial court ruled this cause of action was "out as a tort." "The most fundamental rule of appellate review is that an appealed judgment or order is *presumed to be correct*. 'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' [Citations.]" (Eisenberg, *supra*, ¶¶ 8.15-8.17, pp. 8-4 to 8-5.) Ambiguities are resolved in favor of the judgment and the burden is upon the appellant to affirmatively demonstrate error. (*Id.,* at ¶¶ 8:16-8:17.1, p. 8-5.) We will presume that any portion of the damages award which may have been attributable to either emotional distress or used as a basis for the punitive damages award was not attributable to breach of the implied covenant, but was attributable to the verdicts on the tort causes of action. Such tort causes of action included, among others, trespass and fraud.

B. Defendant contends that the jury erroneously awarded tort damages for actions that essentially constituted a breach of the lease. He argues that the relationship between

the parties was exclusively contractual and that the breach of the contract could not support tort liability. We find no error.

In *Aas v. Superior Court* (2000) 24 Cal.4th 627, the California Supreme Court recognized the general rule against tort liability for a negligent breach of contractual obligations, but also recognized that tort liability properly may be imposed where *something more* than a negligent breach of contract is involved—i.e., for breach of an independent duty imposed by tort law. (*Id,* at p. 643.) The court stated: "A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations. Instead, ' "[c]ourts will generally enforce the breach of a contractual promise through contract law, *except when the actions that constitute the breach violate a social policy that merits the imposition of tort remedies.*" ' (*Erlich v. Menezes* [(1999)] 21 Cal.4th 543, 552 [(*Erlich*)], quoting *Freeman & Mills, Inc. v. Belcher Oil Co.* [(1995)] 11 Cal.4th 85, 107 (conc. & dis. opn. of Mosk, J.).) This court recently rejected the argument that the negligent performance of a construction contract, *without more*, justifies an award of tort damages. (*Erlich v. Menezes* at pp. 550-554 [reversing an award of damages for emotional distress for negligent construction].) *In so doing, however, we reiterated that conduct amounting to a breach of contract becomes tortious when it also violates a duty independent of the contract arising from principles of tort law.* (*Id.* at p. 551.)" (*Aas v. Superior Court,* at p. 643, italics added.) (See generally *Ingham v. Luxor Cab Co.* (2001) 93 Cal.App.4th 1045.)

In *Erlich, supra,* 21 Cal.4th 543, the Supreme Court reversed a judgment awarding emotional distress damages for a negligent breach of a construction contract. The court held that plaintiff homeowners could not recover damages for emotional distress where "the contractor's negligence directly caused only economic injury and property damage, *and breached no duty independent of the contract* . . . ." (*Id.* at p. 548, italics added.) The *Erlich* court emphasized that the jury had *rejected fraud and negligent misrepresentation claims* against the contractor and had found for the homeowners only on causes of action for breach of contract and negligent construction. (*Id.* at pp. 549,

554.) *Erlich* discussed the distinctions between tort and contract measures of damages.[8] It observed that " ' "[T]he distinction between tort and contract is well grounded in common law, and divergent objectives underlie the remedies created in the two areas. Whereas contract actions are created to enforce the intentions of the parties to the agreement, tort law is primarily designed to vindicate 'social policy.' [Citation.]" ' [Citations.] While the purposes behind contract and tort law are distinct, the boundary line between them is not [citation] and the distinction between the remedies for each is not ' "found ready made." ' [Citation.]" (*Erlich,* at pp. 550-551.) *Erlich* recognized the correctness of the observation "that 'the same wrongful act may constitute both a breach of contract and an invasion of an interest protected by the law of torts.' (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774, citing 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 139, pp. 203-204.)" (*Erlich,* at p. 551.) *Erlich* observed that breach of a duty created by a contractual obligation "gives rise to tort liability" when the duty "is either completely independent of the contract or arises from conduct which is both intentional and intended to harm." (*Id.* at p. 552.)

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[8] "In an action for breach of contract, the measure of damages is 'the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom' (Civ. Code, § 3300), provided the damages are 'clearly ascertainable in both their nature and origin' (Civ. Code, § 3301). In an action not arising from contract, the measure of damages is 'the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not' (Civ. Code, § 3333)." (*Erlich, supra,* 21 Cal.4th at p. 550.)

" 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. [Citations.] This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal. 4th 503, 515.) 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered. [Citation.]' (*Id*. at p. 516.)" (*Erlich, supra,* 21 Cal.4th at p. 550.)

Erlich described the circumstances in which a tortious breach of contract might be found: "Generally, outside the insurance context, 'a tortious breach of contract . . . may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion or; (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.' (*Freeman & Mills,* [*Inc.* (1995)] 11 Cal.4th [85,] 105 (conc. and dis. opn. of Mosk, J.).) Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated. (*Applied Equipment* [*Corp. v. Litton Saudi Arabia, Ltd.*]*, supra*, 7 Cal.4th at p. 515.) If every negligent breach of a contract gives rise to tort damages the limitation would be meaningless, as would the statutory distinction between tort and contract remedies." (*Erlich, supra,* 21 Cal.4th at pp. 553-554.) Consequently, because the jury had concluded that the defendant-contractor had not acted intentionally and was not guilty of either fraud or misrepresentation, the remaining claim for negligent breach of contract was insufficient to support emotional distress tort damages for violation of an independent tort duty. (*Id.* at p. 554.)

The circumstances here could not be more different from the facts presented in *Erlich*. The jury found for plaintiffs and against defendant on the causes of action for trespass and fraud, each of which in the circumstances presented was a violation of independent tort duties.

1. Here, defendant's trespass not only breached the lease, but it also clearly violated a duty independent of the contract, arising from principles of tort law. The tort of trespass to property is the "unlawful interference with its possession." (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 604, p. 704.) "The tort may be committed by an act which is intentional, reckless or negligent, or is the result of ultrahazardous activity. . . . [¶] There may be trespass by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of

some other person. (Rest.2d, Torts § 158.)" (5 Witkin, Summary of Cal. Law, *supra,* § 604, p. 704.)

Moreover, "a trespass may occur if the party, entering pursuant to a limited consent, i.e., limited as to purpose or place, proceeds to exceed those limits by divergent conduct on the land of another. 'A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.' (Rest.2d Torts, § 168.) [¶] Section 183 of the Restatement notes that the privilege conferred must be exercised at a 'reasonable time and in a reasonable manner.' " (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 17.)

It is well established that "[a]n unauthorized entry by the landlord is a trespass; and, depending upon the egregiousness of the abuse, may entitle the tenant to consequential damages for harassment, invasion of privacy, or negligent or *intentional infliction of emotional distress.* [Italics added.] (Cf. [Civ. Code,] § 1954 [(applicable to dwelling units)—' . . . landlord shall not abuse the right of access or use it to harass the tenant'].) [¶] The particular cause of action and damages recoverable will depend upon the nature of the landlord's wrongful entry. Such actions are likely to be sustained only in cases of *repeated* and *serious* abuse." (Friedman, *supra,* ¶ 4:97, pp. 4-22 to 4-22.1.)

Substantial evidence supports the jury's finding trespass and also the implied finding that such trespass was intentional, even willful, as well as repeated and a serious abuse of plaintiffs' possessory rights.

Defendant's argument that there was no substantial evidence of trespass is relegated to his appellant's reply brief and may be deemed "waived." In any event, his argument that the evidence showed the addition was built during the August 1997 closure is unpersuasive. Although the addition may have been "completed" or repaired during that closure, construction upon the addition began, according to plaintiffs' evidence, as early as November 1995, and was well underway by April 1996. Defendant also relies upon Judge Wheatley's observation in the statement of decision that any trespass was "premised upon the contract between the parties." That statement of decision was superseded by our reversal of the court's grant of a new trial.

Defendant argues in his opening brief that the trespass claim as pleaded encompassed only his entry in August 1997 to conduct retrofitting activities. Having so narrowed the claim, defendant proceeds to cut down this straw man by asserting that he was authorized by the lease and by plaintiffs to enter in August 1997 to conduct the retrofitting activities. We are not persuaded by the premise and therefore reject defendant's conclusion.

In plaintiffs' second amended complaint, the fifth cause of action for trespass alleged that "[I]n or about August, 1997, defendant[], without the consent or authority and against the will of the plaintiffs, entered onto the premises and committed the following acts . . . ."

However, the complaint incorporated by reference other allegations covering defendant's construction work from 1995 through May 1998. Moreover, plaintiffs were clear at trial that the basis for their trespass claim was defendant's unauthorized entry and conduct of construction activities in connection with his building of the storage addition.[9]

Any variance between the trespass cause of action in the complaint and the ongoing trespasses proved at trial could be deemed "immaterial." "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. . . ." (Code Civ. Proc., § 469.) Defendant does not even attempt to demonstrate he was misled to his prejudice.

Moreover, " 'It has long been settled law that where (1) a case is tried on the merits and (2) the issues are thoroughly explored during the course of the trial, and (3) the theory of the trial is well known to court and counsel, the fact that some of the issues were not pleaded does not preclude an adjudication of those issues . . . .' " (Weil

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[9] "THE COURT: . . . Insofar as your trespass is concerned, what are you contending was the trespass? [¶] . . . [¶] [Plaintiffs' counsel]: There was no permission to build an addition, and facts certainly give rise to the inference that he went in there to build an addition."

& Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2004) ¶ 6:10, p. 6-3, quoting *Frank Pisano & Assocs. v. Taggart* (1972) 29 Cal.App.3d 1, 16.)

2. The record provides ample evidence of defendant's fraud and misrepresentations. These include, but are not limited to: evidence that defendant promised to complete the work in "utmost efficiency," telling plaintiffs the work would begin "very soon" within the initial term of plaintiffs' lease and would take six to eight weeks, when he had in fact told the engineer at BMP that there was "no rush" with the plans; evidence that when defendant began building the addition, he first said he was digging a garden and later falsely told plaintiffs he was building a walk-in cooler to belatedly obtain their permission to continue building the addition; evidence that he undertook to build the addition without telling plaintiffs that the work was not part of the retrofitting, despite having a permit for the retrofitting only; evidence that when he began the actual retrofit and told plaintiffs that they could leave, he also told them that the work would only take two or three weeks longer; evidence that he never disclosed to plaintiffs or to their realtor the existence of a condition upon the use permit for the premises that required sealing of the rear doors and windows.

"Tort damages have been permitted in contract cases where . . . the contract was fraudulently induced." (*Erlich*, *supra,* 21 Cal.4th at pp. 551-552.) Lack of an intent to perform is a question of fact for the jury and may be proved circumstantially. (See *Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1238-1239[10]; *Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 994[11].) Substantial

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[10] "[N]o public policy is served by permitting a party who never intended to fulfill his obligations to fraudulently induce another to enter into an agreement. In recognition of this principle, [Civ. Code,] section 1710, subdivision (4) defines fraud as the making of a promise done without any intention of performing the obligation. ' "A promise to do something necessarily implies the *intention to perform*, and, where such an intention is absent, there is an implied misrepresentation of fact, which is actionable fraud. [Citations.]" [Citations.]' [Citation.]

"Recognizing the adverse effect fraud has on commercial transactions, the law permits a defrauded party to seek punishment of the wrongdoer through the imposition of punitive damages. 'Although punitive damages may not ordinarily be given for breach of

evidence here supports the fraud finding of the jury on multiple bases: First, defendant fraudulently induced plaintiffs to enter the contract both by affirmative misrepresentations and by concealing material information when he had no intention of performing as promised. Second, aside from the false promises inducing the contract, as time went on, defendant made numerous other misrepresentations independent of the contract, upon which plaintiffs relied.

Defendant argues that plaintiffs did not adequately prove they relied upon any alleged misrepresentation by defendant. The claim is without merit. Defendant cites to the allegations of the pleadings that plaintiffs "agreed to pay double the market value as rent for the premises." The essence of defendant's argument is that other evidence that plaintiffs' rental was the same as that paid by previous tenants, that plaintiffs signed an acknowledgement that terms were "not negotiable," and that plaintiffs did not read the lease demonstrates they did not rely upon his promises. First, that plaintiffs acknowledged the lease terms were "not negotiable" does not undermine their testimony that, but for defendant's misrepresentations, they would not have leased the premises. Second, plaintiffs' testimony, contrary to defendant's, that they believed the rent they

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contract, whether the breach be intentional, willful or in bad faith [citations], such damages may be awarded where a defendant fraudulently induces the plaintiff to enter into a contract. [Citations.] The words "oppression, fraud, or malice" in Civil Code section 3294 being in the disjunctive, fraud alone is an adequate basis for awarding punitive damages. [Citations.]' [Citation.]" (*Las Palmas Associates v. Las Palmas Center Associates, supra,* 235 Cal.App.3d at pp. 1238-1239.)

11 "Punitive damages are not recoverable in an action for breach of contract no matter how wilful, malicious or fraudulent the breach. (Civ. Code, § 3294; [citation].) They may, however, '[be] awarded where a defendant fraudulently induces the plaintiff to enter into a contract. [Fn. omitted.] [Citations.] The words "oppression, fraud, or malice" in Civil Code section 3294 being in the disjunctive, fraud alone is an adequate basis for awarding punitive damages. [Citations.]' Although the contract may fix the compensation, it does not prevent recovery of exemplary damages. [Citations.] The application of this rule which permits punitive damages where both fraud and breach of contract exists is only consistent with the underlying policy for the application of punitive damages. (Civ. Code, § 3294.)" (*Walker v. Signal Companies, Inc., supra,* 84 Cal.App.3d at p. 996.)

were paying was twice the market value, and that they would not have leased the premises but for defendant's false assurances as to his intention to quickly and efficiently retrofit the premises raised credibility issues. This factual dispute was for the jury to resolve. It did so in favor of plaintiffs.

Nor does the fact plaintiffs signed an agreement with Schwartzburd to keep the back door and restaurant window closed show a lack of reliance upon defendant's failure to tell them of the City's official sealing order. The agreement is not the same as an official sealing order. Plaintiff Mirzai testified he would not have entered the lease had he known of the official sealing order. Plaintiff Afare testified he probably would have signed the lease, knowing of the sealing order, if there had been adequate ventilation. Again, whether plaintiffs reasonably relied upon defendant's failure to disclose the sealing order was a jury question.

3. Defendant argues the "economic loss rule" precludes tort damages recovery here, where the breach has resulted neither in bodily injury nor property damage, but only economic loss. The economic loss rule is inapposite here, where the action is not a claim for strict liability or negligence in the manufacture of a defective product, but where the tort causes of action encompass *intentional* fraud and misrepresentation and *intentional* trespass. As Witkin summarizes the economic loss rule: "In actions for negligence or strict liability, a manufacturer's liability is limited to damages for physical injuries. Under *Seely v. White Motor Co.* (1965) 63 [Cal.]2d 9, 18 . . . , no recovery is allowed for economic loss alone." (6 Witkin, Summary of Cal. Law (2004 supp.) § 964A, p. 261.) The cases cited by defendant involve claims of strict liability or negligence actions against manufacturers or contractors or developers arising from various product defects, including construction defects in homes. (See, e.g., *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 482 ["recovery under the doctrine of strict liability is limited solely to 'physical harm to person or property' "]; *Aas v. Superior Court, supra,* 24 Cal.4th 627 [homeowners may not recover damages in negligence for construction defects that have not caused property damages]; *Erlich, supra,* 21 Cal.4th at pp. 552-554 [emotional distress damages not recoverable for the negligent breach of a contract to construct a

house where contractor's negligence directly caused only economic injury]; *Sacramento Regional Transit Dist. v. Grumman Flxible* (1984) 158 Cal.App.3d 289, 293 ["where damage consists solely of 'economic losses,' recovery on a theory of products liability is precluded"]; *Zamora v. Shell Oil Co.* (1997) 55 Cal.App.4th 204, 208-213 [economic loss rule precluded homeowners' from recovering in negligence or strict liability for defective pipes used in the construction of the plumbing systems in their homes where the pipes did not leak or otherwise fail]; *S.M. Wilson & Co. v. Smith Internat., Inc.* (1978) 587 F.2d 1363, 1376 [buyer could not recover against seller on negligence cause of action for the failure of a tunnel drilling machine to perform as expected].)

4. Defendant also argues, based upon *Erlich, supra,* 21 Cal.4th 543, that emotional distress damages were erroneously awarded as consequential or special damages on the contract claim. In *Erlich,* the Supreme Court concluded first, that tort damages were not available for negligent construction under the economic loss rule where the only injury was economic loss. (*Id.* at pp. 554-558.) Having concluded under the facts before it that tort damages were not available, the court then held that "damages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California. [Citations.] 'Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.' (Rest.2d Contracts, § 353.) The Restatement specifically notes the breach of a contract to build a home is not 'particularly likely' to result in 'serious emotional disturbance.' (*Ibid.*)" (*Erlich,* at pp. 558-559.) We agree with the rule espoused by *Erlich*; however, we find it inapposite here where there is ample evidence of intentional rather than merely negligent tortious behavior by defendant causing plaintiff Afare emotional distress.[12] As we have discussed heretofore, nothing in the jury's

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[12] Nor do we accept defendant's mere assertion, unsupported by argument, that the evidence of emotional distress was "wholly inadequate" to support a recovery. The record amply supports that plaintiff Afare, at least, suffered significant emotional distress caused by defendant's tortious behavior.

special verdicts tie any award of damages for emotional distress to the breach of contract cause of action. Indeed, the special verdict did not contain a separate finding on the emotional distress claims at all, and we refuse to assume that the damages award included an erroneous award for emotional distress based upon the breach of contract cause of action. (Eisenberg, *supra*, ¶¶ 8.16-8.17.1, pp. 8-5 to 8-6.)

We reject defendant's contention that "none of plaintiffs' allegations of misrepresentation concern any wrongdoing independent of the alleged breach of contract, but relate entirely to defendant's performance of his obligations under the contract . . ." Defendant then reiterates the misrepresentation allegations set forth in the tenth cause of action of the second amended complaint: "Pursuant to the rental agreement MATOSSIAN promised that the retrofitting work he was required to perform would be performed as expeditiously as possible."

As we have stated heretofore, the trespass, fraud and misrepresentation claims were not coterminous with the breach of contract claims. Although defendant's actions may have constituted breaches of the lease, these actions also violated duties independent of the contract arising from principles of tort law. (*Aas v. Superior Court, supra,* 24 Cal.4th at p. 643.)

Defendant argues that the economic loss rule should also bar tort recovery for intentional misrepresentation of a contract term. Recognizing this is not the law in California, defendant argues that out-of-state cases support such a rule. We disagree. The cases defendant cites describe a rule applicable in the construction defect-product liability context or arising under the Uniform Commercial Code (U.C.C.) provisions regarding the sales of goods—and not in this landlord-tenant context where there is no claim of defective product, strict liability, or the sale of goods subject to the U.C.C.[13] In

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[13] *Calloway v. City of Reno* (2000) 116 Nev. 250, 993 P.2d 1259, a construction defects case, does not even stand for the proposition defendant advances. It does *not* hold that the economic loss rule should bar recovery for intentional misrepresentation of a contract term. The misrepresentation causes of action were dismissed against the developer and contractor before trial and were not brought against subcontractors. (*Id.* at

any event, they do not represent the law in this state and we see no reason to expand the doctrine beyond the confines of even those cases to the landlord-tenant context present here. As plaintiffs argue, the presence of a contract is not a license to commit fraud, trespass or other tortious conduct.

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pp. 254-255.) The Nevada court described the case as involving negligence and summarized its holding as follows: "[T]he district court properly applied the economic loss doctrine to preclude appellants' *negligence* claims against the subcontractors and the City. We further conclude that the *economic loss doctrine bars appellants' claim in strict products liability*. . . ." (*Id.* at pp. 253-254, italics added.)

Huron Toll & Engineering Co. v. Precision Consulting Servs. (1995) 209 Mich.App. 365, involved an action for defective software. The court described the economic loss doctrine as applying to sales of a product subject to warranty and contract remedies under the U.C.C. "The economic loss doctrine provides that 'where a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.' [Citation.]" While plaintiff could not pursue a claim for fraud in the terms of the contract, the court concluded that the plaintiff *could* "pursue a claim for fraud in the inducement extraneous to the alleged breach of contract." (*Id.* at p. 374.)

In an class action seeking damages for defective products against an automobile manufacturer, the court in *Werwinski v. Ford Motor Co.* (3d Cir. 2002) 286 F.3d 661, 678, recognized that courts were split on the issue of applying the economic loss doctrine to intentional misrepresentation claims. The court refused to apply an intentional fraud exception to the economic loss rule. (*Id.* at p. 681.) (See also *Cooper Power Systems v. Union Carbide* (7th Cir. 1997) 123 F.3d 675, 682 [In an action to recover for allegedly defective paint, where the misrepresentations went to the product's quality, "Wisconsin would not allow a negligence or strict liability misrepresentation claim seeking to recover economic damages"].)

Other cases relied upon by defendant involved the commercial sale of goods subject to the U.C.C.: *Dinsmore Instrument Co. v. Bombardier Inc.* (6th Cir. 1999) 199 F.3d 318, 320, involved the sale of goods. In that case a manufacturer of compasses sued the buyer for breach of contract and fraud. The court held the fraud in the inducement claim was barred because the alleged fraud was not extraneous to the contract. *AKA Distributing Co. v. Whirlpool Corp.* (8th Cir. 1998) 137 F.3d 1083, affirmed summary judgment for the manufacturer in a distributor's action for breach of contract and fraud claims arising from the cancellation of the distributorship agreement and subject to the U.C.C. Because the predominant purpose of the contract was the sale of goods, not services, the economic loss doctrine foreclosed the fraud claims, where the fraud claims were not independent of the contract. (*Id.* at pp. 1086-1087.)

C. Defendant argues that the lease sets the measure of damages for the construction disruption suffered by plaintiffs and that plaintiffs suffered no damages. Defendant founds his argument upon language of the initial lease relating to exercise of the option: "Lessees are hereby granted and shall, if not at the time in default under the first term's lease, have an option to execute a new lease for an additional period of three years upon the expiration of the term of the initial lease, at five percent increment per year every year of the option period." (Lease, ¶ 25.) He contends that plaintiffs did not exercise the option to extend the lease and that they did not enter a new lease for a five-year term, but were merely month-to-month tenants following the April 1995 expiration of the initial lease. He then builds upon this foundation an argument that plaintiffs were obligated to pay rent of $7,000 as holdover tenants on a month-to-month basis and that they bargained for a substantial reduction in the rent as compensation for the inconveniences they suffered from defendant's construction activities. This argument relies heavily upon defendant's version of the facts. (Defendant claimed plaintiffs rejected a new five-year lease, but bargained for a rent reduction on a month-to-month schedule.) It ignores the standard of review and the many reasons the jury had to disbelieve defendant, who was caught in one lie after another during his testimony. Ample evidence was presented that plaintiffs told defendant that they wanted to exercise the option and that they did so by signing page two of the Addendum. Plaintiff Mirzai testified that the difference in the rent they paid and the rent scheduled in the Addendum was for defendant's failure to promptly begin the retrofitting work within the first six months as he had promised. Such testimony may have supported a finding of an "accord and satisfaction" of damages caused by that particular promise to begin promptly; however, the jury was not required to believe that the reduction in rent paid by plaintiffs from that scheduled in the Addendum was agreed to compensation for the ongoing inconvenience of the construction work or compensation for plaintiffs' injuries as a result of defendant's continuing fraud and trespass.

The statute of frauds does not require the exercise of an option already contained in a written lease to be in writing. (*Ripani v. Liberty Loan Corp.* (1979) 95 Cal.App.3d

603, 609-610.) Only the modification of the option changing the term from three years to five was required to be signed by defendant to satisfy the statute of frauds, and it was. The Addendum was adequate for that purpose.[14] Plaintiffs were not "holdover" tenants, subject to the "holdover rent" stated in the initial lease.

Defendant also argues that plaintiffs' only cognizable damages were of lost profits and that there were no lost profits. At trial, plaintiffs relinquished any claim for lost profits except for profits lost during the two and one-half months they remained closed after defendant claimed the retrofit was completed. Our determination, stated above, that substantial evidence supported the award of tort damages for fraud and trespass, and for emotional distress based thereupon, undermines this claim.[15]

D. Defendant contends that even were contract and tort remedies both supportable, plaintiffs failed to elect between them.[16] However, it is clear that defendant has waived

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[14] Although defendant raised the statute of frauds as an affirmative defense in his answer to the second amended complaint, he has not cited to any argument in the trial court where he contended below that the Addendum was inadequate to satisfy the statute of frauds.

[15] Moreover, plaintiffs produced evidence of more than $50,000 in damages attributable to their out-of-pocket loss and the value of their labor repairing some of defendant's errors, and the amounts they paid in rent during the two and one-half months the premises were closed beyond the August retrofit period. They also produced evidence of the rents they paid over the entire period of defendant's trespass.

[16] "Election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based on the same set of facts. The doctrine rests on the rationale that when a plaintiff has pursued a remedy which is inconsistent with an alternative remedy and thereby causes the defendant substantial prejudice, the plaintiff should be estopped from pursuing the alternative remedy. [Citation.] As previously noted . . . a plaintiff may pursue inconsistent counts in a complaint by pleading the same cause of action based on different legal theories or different versions of the facts set out in separate counts. The doctrine of election of remedies requires only that the plaintiff choose between any inconsistent, mutually exclusive remedies at some time before judgment is entered. [4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 370, pp. 471-472; see also 3 Witkin, Cal. Procedure, *supra,* Actions, § 174, pp. 243-244.]" (Lambden et al., Cal. Civil Practice and Procedure (2000) § 7.21, p. 28.) We need not address plaintiffs' rejoinder that the contract and tort remedies were not necessarily inconsistent

any affirmative defense of failure to elect between remedies by his failure on appeal to point to any effort by him to raise that defense or pursue it in a timely manner below. "The doctrine of election of remedies is a form of estoppel and is therefore an affirmative defense that must be specially pleaded, unless it appears on the face of the complaint. Moreover, since the doctrine is intended for the benefit of the party sought to be bound, it may be waived by him or her, either expressly or by the failure to plead it." (Lambden et al., Cal. Civil Practice and Procedure, *supra,* § 7.21, p. 30; *Roam v. Koop* (1974) 41 Cal.App.3d 1035, 1041-1045.)

III. Alleged Procedural Irregularities

A. *Disqualification of Judge Wheatley on Remand*

1. Defendant contends that the presiding judge erred in granting plaintiffs' Code of Civil Procedure section 170.6 challenge to Judge Wheatley following our reversal of the grant of the new trial and remand for further proceedings. However, defendant failed to file a petition for writ of mandate within the 10-day statutory period. (Code Civ. Proc., § 170.3, subd. (d).[17]) Consequently, the attempt to seek appellate review of the order granting plaintiffs' peremptory challenge is not cognizable on appeal. (E.g., *People v. Webb* (1993) 6 Cal.4th 494, 862 P.2d 779; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 192, 194-195.) "The Legislature determined in enacting [Code of Civil Procedure] section 170.3, subdivision (d), that an appellate court should have an opportunity to redress an incorrectly decided [Code of Civil Procedure] section 170.1 or 170.6 motion before the issue in the case is decided on the merits. We conclude this section is equally

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or mutually exclusive, as arising out of different obligations, and different construction activities and failures by defendant.

[17] Code of Civil Procedure section 170.3, subdivision (d), provides: "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision . . . ."

applicable to grants of section 170.6 challenges as to denials." (*In re Sheila B.,* at p. 195.)[18]

2. In his appellant's reply brief, defendant for the first time argues that appointment of Judge Freedman was improper because Judge Freedman had represented witness Schwartzburd in the past, a fact well-known to both parties at the time the case was reassigned. In the trial court, defendant objected to the assignment of Judge Freedman to hear remaining issues, threatening, "I'll file a declaration under 170.6 if I have to . . . ." The record does not indicate that defendant ever did file such a challenge to Judge Freedman in the trial court. In any event, defendant has clearly waived any issue on appeal as to the appointment or appearance of impartiality of Judge Freedman by his failure to raise such issue in his opening brief. "[I]ssues not properly addressed in the opening brief will be *disregarded* on appeal . . . ." (Eisenberg, *supra*, ¶ 9:78.2, pp. 9-23 to 9-24; e.g., *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894-895, fn. 10; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 559, fn. 28.)

B. *Entry of judgment based upon the transcript of the jury verdict rather than the written verdict form*

A special verdicts form submitted by the foreperson upon rendering the jury verdict asked in Special Verdict 3 whether defendant's failure to perform his obligations under the contract was "excused." The foreperson wrote in the answer: "yes." After reading of the special verdicts, the jury was asked, "is that your true and correct verdict?" One of the jurors indicated that the answer to Special Verdict 3 was incorrect and that the answer should be "no." The entire jury was polled, reading each question and the answer given to each question in the special verdict. As to Special Verdict 3, 10 of the 12 jurors responded that they had answered "no," such failure was not excused. Two responded

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[18] We note the principal case upon which defendant relies, *Peracchi v. Superior Court* (2003) 30 Cal.4th 1245, was an appeal from the granting of a petition for writ of mandamus by the Court of Appeal.

that they had not voted no. However, the written special verdict form was not changed accordingly at that time. Nor was judgment entered on the verdict at that time. Before the judgment was signed and filed by the court, defendant filed a motion for judgment notwithstanding the verdict or in the alternative for a new trial. On January 23, 2002, Judge Wheatley filed a statement of decision, denying defendant's motion for JNOV, but purporting to grant the motion for new trial if defendant did not consent to a reduction in the award of compensatory and punitive damages. The statement of decision reflected the court's belief that the jury had found defendant's failure to perform the contract was excused. Plaintiffs promptly moved to correct the written verdict form and to enter judgment according to the jury's true verdict. On March 1, 2002, the trial court granted defendant's motion for a new trial. Plaintiffs sought a writ of mandate, which we granted on the grounds the 60-day period of Code of Civil Procedure section 660 for ruling on a motion for new trial had expired and the court no longer had the power to grant the new trial. (*Mirzai v. Superior Court* (May 28, 2002, A098267) [nonpub. opn.])

On remand, plaintiffs renewed their motion to enter judgment nunc pro tunc on the jury's special verdicts. Judge Freedman granted the motion, finding "that the Special Verdict form filed on July 27, 2001, is incorrect as to Special Verdict 3, that the jury and trial court corrected the inaccuracy on the record, so that Judgment shall be entered in accordance with the special verdicts as evidenced by the certified transcript of the proceedings." On August 14, 2002, judgment was entered on the jury verdict and the answer to Special Verdict 3 was stated to be "no".

Defendant contends that the judgment entered is contrary to the jury verdict based upon the special verdict form signed by the foreman, which answered "yes" to the question whether the breach of contract was "excused."

Defendant relies upon cases and authorities holding that the failure to object to the form of the verdict before the jury is discharged waives any ambiguity or insufficiency in the verdict and that once the jury is discharged, the court cannot alter the verdict nor call the jury to alter or amend the verdict. (E.g., *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, 456; *Jensen v. BMW of North America, Inc.* (1995)

35 Cal.App.4th 112, 131; *People v. Romero* (1982) 31 Cal.3d 685, 692; Wenger et al., Civil Trials and Evidence (The Rutter Group 2003) §§ 17:42, 17:43, pp. 17-10 to 17-11.) We do not believe the trial court's actions here ran afoul of the principles set forth in these authorities, which pertain to "belated impeachment" of jury verdicts. (*People v. Romero,* at p. 693.)

Plaintiffs did not "waive" any error or ambiguity in the jury verdict. Nor was there any "belated" impeachment. Indeed, any possible confusion or ambiguity in the verdict itself was addressed at the time the verdict was rendered and *before* the jury was discharged through the polling of the jury, as appears in the reporter's transcript. Defendant does not contend that the reporter's transcript is inaccurate. The jury verdict was reflected in the reporter's transcript, which has been termed "presumptively correct." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 358.) Only a clerical error or oversight allowed the written special verdict form to go uncorrected at that time and the jury's verdict itself, as reflected in the reporter's transcript, was clear and unambiguous.

Moreover, the rule reflected in the authorities cited by defendant—that failure to object to the form of a verdict before the jury is discharged waives any defect—"is not automatic, and there are many exceptions. [Citations.]" (*Woodcock v. Fontana Scaffolding & Equip. Co., supra,* 69 Cal.2d at p. 456, fn. 2.) For example, in *People v. Trotter* (1992) 7 Cal.App.4th 363, the information alleged that the defendant personally used a firearm in the commission of the offense. The jury was properly instructed as to personal use within the meaning of Penal Code section 12022.5. The printed verdict form referred to section 12022.5, but, through a clerical error, stated that defendant was " 'armed with a firearm.' " After the jury was discharged, the trial court modified the verdict form by striking the word " 'armed' " and adding the words " 'personally used.' " (*Id*. at p. 369.) The appellate court held such action was authorized as a clerical correction to the verdict forms. Finding no ambiguity to the verdict rendered by the jury, the court stated: "Defendant asserts the trial court was without authority to amend the verdicts after the jury was discharged, as the verdicts were already complete within the meaning of [Penal Code] section 1164. But the court did nothing more than correct

clerical errors in the verdict *forms*; the court did not modify the verdicts themselves. Clerical corrections to verdict forms after a jury has been discharged have been upheld in federal court. (*United States v. Stauffer* (9th Cir. 1990) 922 F.2d 508, 513-514.) Though *Stauffer* relied on a federal rule of criminal procedure allowing clerical mistakes in judgments or orders to be corrected, California has long recognized that a trial court has similar authority to correct clerical errors in court documents. (See 6 Witkin & Epstein, Cal. Criminal Law (2d ed. 1989) Judgment and Attack in Trial Court, § 3129, pp. 3861-3862; see also 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 68, pp. 502-503.) The court was authorized to make clerical corrections to the verdict forms." (*People v. Trotter,* at pp. 369-370, fn. omitted.)

We conclude the trial court did not exceed its jurisdiction in ordering that judgment be "entered in accordance with the special verdicts as evidenced by the certified transcript of the proceedings."

C. *Jury's refusal to award defendant money damages despite its finding that plaintiffs breached the contract and that defendant was damaged*

Defendant challenges the jury's award of no money to him, upon its finding that plaintiffs breached the contract and that he suffered damage as a result. He contends that he testified he incurred $10,900 as the cost of installing the ventilation system. Defendant quotes from the superseded statement of decision issued by Judge Wheatley to the effect that the jury's determination that the amount of damages was zero was not supported by the evidence. The argument he makes in his appellant's opening brief is wholly inadequate, and without citation to any relevant authority.[19] Defendant has waived this issue by failing to adequately argue his point. (Eisenberg, *supra,* ¶ 9:21,

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[19] We note the inadvertent citation in his opening brief to a nonexisting Code of Civil Procedure section 654, subdivision (5). Although defendant rectifies this error in his reply brief, citing to Code of Civil Procedure section 657, subdivision (5), the citation does not advance his argument on appeal. That section and subdivision provides that a verdict may be vacated or a new trial granted by the trial court for "[e]xcessive or inadequate damages." Defendant fails to cite pertinent authority in his opening brief as to *why* such award was inadequate.

pp. 9-5 to 9-6 ["the appellate court can treat as *waived* any issue which, although raised in the briefs, is *not supported by pertinent or cognizable legal argument or proper citation of authority*"]; *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo, supra,* 38 Cal.App.4th at p. 559.)

In any event, defendant's claim cannot be sustained. *Smith v. Covell* (1980) 100 Cal.App.3d 947, cited in defendant's reply brief, is inapposite. In that tort action, the jury awarded zero dollars to plaintiff husband despite uncontroverted evidence of a loss of consortium he suffered as a result of injuries to his wife caused by the defendant's negligence. The appellate court concluded: "In such factual posture, the verdict was inadequate as a matter of law. 'The duty of the appellate court to set aside the verdict of the trial court is the same where damage is proven as a proximate result of defendant's negligence, the exact amount of plaintiff's special damages are awarded, and no award is made for the detriment suffered through pain, suffering, inconvenience, shock, or mental suffering. In such a situation we hold an award limited strictly to the special damages is inadequate as a matter of law.' [Citation.] . . . [¶] In the face of uncontradicted evidence of the loss of consortium, the zero verdict is a special category of inadequate damages resulting from the failure of the jury to follow the court's instructions of law." (*Id*. at p. 956; but see *Da Silva v. Pacific King, Inc.* (1987) 195 Cal.App.3d 1, 12.)

The cause of action on the cross-complaint here was not based on tort, but on contract. The jury was not dealing with the value of subjective pain and suffering, but with evidence of quantifiable loss. Although defendant argued at trial that under his cross-complaint he was entitled to reimbursement for the cost of the ventilation system under paragraph 5 of the lease, the jury might have based its determination upon a different breach of the lease. During opening statement, the defendant informed the jury that the cross-complaint "has to do with windows and doors." Defendant also presented evidence that plaintiffs failed to carry plate glass insurance, contrary to the provisions of the lease, and that the plate glass was broken in August 1997. However, defendant failed to offer evidence as to the cost of replacement. The jury conceivably could have

determined the breach of the lease was of this provision. If so, defendant's failure to present evidence as to the cost of repair supports the jury's award of zero dollars in the circumstances.

D. ***Remodel promise and the parol evidence rule***

Over defense objections, plaintiffs were allowed to introduce evidence regarding a meeting between the parties before entry into the lease, during which defendant promised to remodel the building. Plaintiff Mirzai was allowed to testify that he understood by the term "retrofitting" in the lease that defendant was "going to improve the building and remodel the whole building" because defendant had told him so. Mirzai also testified that "[b]ased on $6,000 rents, we thought we were going to have a remodel, very good first class restaurant, and—and on that basis, we accept the $6,000." Defendant again challenges admission of that testimony in the "Procedural Irregularities" section of his opening brief. He argues that all such evidence directly contradicted the lease provision in which defendant "merely announced his obligation to the [C]ity to perform seismic retrofitting work." He contends such evidence was admitted in violation of the parol evidence rule. We have addressed the parol evidence issue heretofore. We find no reversible error in the admission of the challenged testimony. (See pt. I.A., *ante*.)

Plaintiffs' Motion for Sanctions

Plaintiffs seek sanctions against defendant and his counsel pursuant to California Rules of Court, rule 27(e). Plaintiffs base their motion upon grounds that defendant's opening brief, and portions of his reply brief, unreasonably violate California Rules of Court, rules 14(a)(1)(B) and (C) and 14(a)(2)(C),[20] and on the ground that the appeal is frivolous and intended solely for delay.

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[20] California Rules of Court, rule 14 sets forth the "Contents and form of briefs" in relevant part as follows: (a) Contents [¶] (1) Each brief must: [¶] . . . [¶] (B) state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and [¶] (C) support any reference to a matter in the record by a citation to the record. [¶] (2) An appellant's opening brief must: "[¶] . . . . [¶] (C) provide a summary of the significant facts limited to matters in the record."

Plaintiffs contend that the "Summary Nature of Appeal" and the "Statement of the Case" contained in defendant's opening brief at pages 1 through 5, purport to state facts, but contain no citation to the record to support any "fact" stated therein, in violation of rules 14(a)(1)(C) and (a)(2)(C), and that the "purported 'facts' stated therein are nothing more than conclusions defendant wishes the jury had reached, rather than the conclusions the jury actually reached." It is true that defendant's failure to include any record citations during the first five pages of his brief violates the rules and makes review difficult. However, the balance of the brief, beginning with the "Procedural History" and continuing through the defendant's argument, does contain record citations adequate for purposes of review.

Also frustrating to this court is the continued reliance in defendant's opening and reply briefs of a slanted view of the facts, relying heavily upon defendant's testimony, which the jury obviously rejected, rather than a factual rendering in accordance with the substantial evidence standard of review applicable on appeal. Moreover, it is also the case, as plaintiffs contend, that defendant often presents a "sparse and one-sided" view of the evidence in his opening brief, only to follow it with a much more extensive reference to the evidence in his reply brief. A case in point is defendant's failure to mention *at all* in his opening brief that he built an addition onto the premises, which addition was not disclosed in the lease and which formed the basis for the jury's trespass finding. Plaintiffs contend such inadequate briefing is "unfair" to their ability to respond to defendant's argument, as it surely is.

However, the usual rules on appeal are adequate to handle such infractions. Where appropriate herein we have held that defendant "waived" an issue by failing to adequately raise and argue it in his opening brief.

Moreover, we are unable to conclude that the appeal is frivolous or intended solely for delay. An appeal may lack merit, without being frivolous. Some of the issues raised here are not so obviously without merit as to justify sanctions. Nor do we see much evidence that the appeal is being prosecuted primarily for delay. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649.) Defendant has filed a bond in the sum of $425,000

to stay enforcement proceedings pending resolution of this appeal. Although plaintiffs argue that the posting of a bond alone is insufficient to evidence good faith and that the bond does not cover the additional award of over $40,000 in court costs, we consider it some evidence that the appeal was not solely for delay or to harass plaintiffs. We therefore deny plaintiffs' motion for sanctions.

The judgment is affirmed. Plaintiffs shall recover their costs in connection with this appeal.

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Kline, P.J.

We concur:

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Lambden, J.

_____
Ruvolo, J.